BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of Court Below.

The findings of fact and conclusions of law of the District Court of the United States for the Northern District of Illinois, Eastern Division, are reported in *38 Fed. Supp. 536,* and also appear in the Record, p. 318, et seq. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit appears in the Record filed in this cause (Rec. 386).

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented herewith and in interest of brevity are not repeated here. Any necessary elaboration on the evidence and on the points of law involved will be made in the course of the argument which follows:

Specification of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred:

(1) In concluding that the relation of employer and employee did not and could not exist between the establishments and the petitioner.

(2) In concluding that the control exercised by the establishments was short of that necessary to constitute them as employer of all of the members of the orchestra, including petitioner.

(3) In concluding that petitioner was an independent contractor and not an employee.

(4) In concluding that petitioner was liable for Social Security taxes for the members of the orchestra of which he was leader, under Title VIII, Section 804, of the Social Security Act.

ARGUMENT.

The novelty and importance of the question at issue in this case, together with the peculiar nature of the employer, employee-union relationship involved, require a somewhat lengthier brief than is customary, for which indulgence is respectfully requested.

I.

The Issue Involved in This Case is of Sufficient Importance to Warrant Consideration by This Court.

This case was instituted as a test case to determine whether the orchestra leaders or the employing establishments are liable for payment of the employers' portion of the tax provided for in Title VIII, Section 804, of the Social Security Act.

The revenue collected by the Government under the Social Security Act is not available for use in maintaining the Government, but is dedicated to the protection of employees against unemployment and incapacity due to age. The Internal Revenue Department was charged with the duty of collecting the tax and the Social Security Board was charged with the duty of administering the fund. Differences arose between the officials of the Bureau of Internal Revenue and the officials of the Social Security Board. The consensus of opinion in the Bureau of Internal Revenue was to the effect that the orchestra leader ought to be held to be an employer and to be required to pay the tax. On the other hand, the officials of the Social Security Board, taking a broader social view of the problem, were of the opinion that the orchestra leader ought to be classified as an employee and thereby become entitled to the social security benefits to the same extent as the sidemen in the orchestra. Much confusion arose.

The Act defines "employment" as:

> "Any service of whatsoever nature performed within the United States by an employee for his employer",

but contains no definition of the terms "employer" or "employee".

The Commissioner of Internal Revenue, in his Regulations (Regulation 90, Article 205; Regulation 91, Article 3), undertook to define "employee" as follows:

> "Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee * * *.
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> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee."

In a subsequent ruling the Bureau undertook to determine when orchestra leaders were and were not employers, and ruled that leaders of so-called "name bands" were employers; other leaders were not. (Treasury Release A. & C. Coll. 4651.) In so far as this ruling held that any leader was an employer, it is in contradiction with an earlier ruling of the Bureau that musicians, including the leader, employed on sponsored radio programs were the employees of the sponsor and not of the leader. The Bureau used the following very apt language, language entirely applicable to the present case:

> "The musicians individually do not practice an independent profession in which they offer their individual services to the public generally as in the case of doctors, lawyers, and other like independent contractors. This is clearly demonstrated by the fact that the musicians are bound together in a voluntary union which (1) fixes the amount of compensation they shall receive for their services; (2) requires that all musicians in a specific employment shall receive the same compensation, regardless of the particular skill or ability of the individual musician or the type of instrument played; and (3) insofar as possible otherwise prescribes and regulates the conditions under which their services may be performed. These are not the characteristics of independent contractors.
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> "At most the musicians are no more than highly skilled employees. They are hired to perform personal services and are subject to control and direction on the part of their employers. True, the employers do not have unlimited control over the musicians, but must employ them in accordance with the rules and conditions prescribed by the union. However, the fact that the musicians are in substance thus enabled to require the employers to adhere to certain standards in respect to wages and other conditions of employment does not make them any the less employees. The employers have the right, within the limits prescribed by the union rules, to control and direct the musicians

> and may exercise their right in respect to such matters and to such extent as considered necessary. Accordingly, the Bureau is of the opinion that the musicians are employees for purposes of the taxes imposed under titles VIII and IX of the Social Security Act." (Opinion March 13, 1937, No. MT:SS:R.)

Upon request of petitioner for a ruling as to his status, the Commissioner held that he was an independent contractor and the members of the orchestra performing with him were his employees within the meaning of the taxing provisions of the Social Security Act and the corresponding provisions of the Internal Revenue Code (R. 33). Petitioner paid certain taxes for 1938 and brought suit in the District Court of the United States for the Northern District of Illinois to recover such payment. The case was tried as a test case on behalf of petitioner and it was so considered by the Government. In preparation, both sides went to great lengths to produce all of the evidence that could have any bearing upon the problem.

Although the case at bar involves Title VIII of the Social Security Act, which was designed to relieve against incapacity due to age, the identical questions presented for determination also arise under Title IX, which was designed to relieve against unemployment. The revenue collected under Title VIII is administered by the Government. Under Title IX the revenue is largely administered by the several States. This means that the Social Security Act has been and will be construed by both the State courts and the Federal courts, thus leaving the opportunity for great diversity of opinion among the courts. It is highly important that the first cases arising under a new Act of Congress be decided properly. Such first cases quickly become settled precedents and influence the whole future course of the construction and administration of the Act. For that reason this Court has been liberal in granting

certiorari in cases where an important new Federal statute is involved.

The implications of the decision by the Circuit Court of Appeals in this case reach beyond the mere question of whether Griff Williams, in 1938, was an employer or an employee, or whether leaders generally are employers or employees. The method of construction used by the court, particularly its disregard of substantially supported findings of fact and its narrow application of common law concepts in the field of torts, will find their way into other cases and other fields of law. The principles laid down by which the question of who is an employer and who is an employee is determined will constitute the measuring stick by which these questions are answered in all other fields of labor and employment. It is important that in the construction and interpretation of an important new Federal law there be uniformity. There is already in the lower courts a great variety and diversity of opinion, particularly in decisions of State supreme courts construing the Act under Title IX. See, for instance, *Hill Hotel Co.* v. *Kinney*, 138 Neb. 760, 295 N. W. 397 (leader held to be an employer); *Steel Pier Amusement Co., et al.*, v. *New Jersey Unemployment Compensation Commission*, 127 N. J. L. 154, 21 A. (2d) 767 (1941), (establishment held employer); *Unemployment Compensation Commission* v. *Matthews*, 56 Wyo. 479, 111 P. (2d) 111, (leader held employer); *In re Rogavin*, 259 Appellate Division 774, 18 N. Y. S. (2d) 302 (1940), employer's application for review denied by the New York Court of Appeals, 27 N. E. (2d) 819 (1940); *In re Ajello*, 259 Appellate Division 949, 19 N. Y. S. (2d) 886 (1940), employer's application for review denied by New York Court of Appeals, 29 N. E. (2d) 975 (1940); *In re Dallapenta* (*Hotels Statler Co., Inc.* v. *Miller*), 261 Appellate Division 863, 24 N. Y. S. (2d) 748 (1941), (establishment held employer).

The typical cases above cited are sufficient to demonstrate to the court that considerable confusion exists amongst the various lower courts as to the status of musicians playing in orchestras. A decision by this Court would clarify the situation and bring order out of confusion.

The importance of a definitive exposition of the meaning of the undefined terms "employer" and "employee" by this Court is obvious from the foregoing. The determination of the specific question involved in this case—whether the leader of an orchestra is an employer liable for Social Security taxes for the other members of the orchestra—is of vital importance to thousands of members of the American Federation of Musicians, of which organization the petitioner is a member. Aside from the monetary consideration, which is very considerable, there has been put into question by the decision of the court below the ability of thousands of such members to remain members, while classified as "employers", of the American Federation of Musicians, for it is generally known that the organization does not take employers into membership. Further, well established practices and customs in the musical field—customs which have become common through long use and which have been crystallized in various provisions of the constitution of the American Federation of Musicians—are threatened with disruption. Finally, thousands of members of the American Federation of Musicians, who may from time to time conduct or lead orchestras, will be deprived of the benefits of old age and unemployment relief if the decision below remains as the law. The class of employee thus excluded is particularly in need of that type of relief, what with the irregularity of their employment and the difficulty of continuing in or obtaining employment in old age. The exclusion of leaders by the court below obviously is in direct disregard of the purposes and

objectives of Social Security legislation, and can be remedied only by this Court.

II—Relevant Considerations—Consideration of the Special Nature of Services Performed by an Orchestra and the Relationship of Leader to Other Musicians in Orchestra, and the Anomalous Effect of Holding a Leader the Employer, Militate Against Decision Below.

Whether a person is an employer or an employee depends upon the factual circumstances of the services being performed viewed in the light of the purposes of the Social Security Act. In order fairly and properly to determine the particular case here under consideration—the status under the Social Security Act of a leader of an orchestra—it is necessary to fully comprehend the special nature of the work or services performed by the orchestra and the special nature of the relationship between the leader of the orchestra and its members. This relationship is peculiar unto itself and finds no counterpart in any other trade or occupation. Clearly understood, it affords explanation for the factors which to the court below seemingly stamped the leader as an employer. For instance, the court below was troubled by the fact that the orchestra leader apparently engaged the services of the members of the orchestra in the first instance, had the power to discharge (although not the sole power), and distributed their pay to them. These apparent anomalies arose out of the necessities of the situation and are quite understandable once the nature of the work being performed is comprehended.

To begin with, an orchestra—leaders and members together—constitutes a single functioning unit, the work or performance of each member of which is dependent upon the work or performance of every other member. By its very nature orchestral music is music performed by a number of musicians playing together under the musical

direction of a leader to produce the desired effect. An orchestra necessarily is engaged or hired as a unit. It is expected to perform as an ensemble and to afford musical pleasure through the cooperative efforts of each of the members of the orchestra, including the leader. In all instances, the leader is a musician and a member of the union, whose function, in addition to contributing to the musical effect desired by the playing of a particular instrument—in the present case the playing of a piano—is obtaining, through his direction, coordination of the playing of all of the individual musicians necessary for the proper rendition of the music being played. An orchestra, then, constitutes a single, indivisible functioning unit composed of various skilled musicians, one of whom as leader performs the additional job of leading. It is, therefore, entirely inconsistent with the facts and with the inherent nature of orchestral music to attempt to separate the orchestra into several units and to segregate the function of the leader from the functions of the other members of the orchestra with which it is inseparably integrated. The employment status of the constituent members must be considered in terms of the unit; the status of the unit is the status of the constituent parts. The orchestra, producing a musical effect as an ensemble by the joint efforts of its component musicians, and hired by an hotel or other establishment to render such music for the pleasure of its patrons and for the profit of the hotel, is in no respect different as far as its employment status is concerned from an individual entertainer whom the hotel might hire to afford pleasure to its patrons, as, for instance, an accordion player, or a singer, or a piano player, or any other type of entertainer. Surely, it could not be doubted that the single entertainer hired by the hotel to entertain its guests for the purpose of attracting attendance to its dining room, cafe or cocktail lounge, and instructed what to play and when, is not an

employee of the hotel, and yet there is no essential distinction between the purposes of the hiring, or of the work performed, or control over exercised by the employing establishment, between an orchestra and an individual entertainer, except that the orchestra supplies the entertainment as an ensemble. For that matter, an orchestra or an individual entertainer is, in essence, no different from other persons or groups of persons hired by the hotel for the purpose of attracting patronage, as, for instance, a chef. In all such cases the object of the employment is to afford pleasure to patrons or guests so as to attract patrons and guests and to attract them in increasing numbers. Could there be any doubt but what a chef and his staff are employees of the hotel? The fact that the services rendered by an orchestra or a chef are highly skilled and hence necessarily limit the ability of the hotel or employing establishment to continuously direct should not detract from the reality of the employer-employee relationship between the hotel and the person or unit hired for the hotel's benefit to perform continuous services for the hotel in the usual course of the hotel's business.

Petitioner's situation can be likened to that of a foreman. As a group or unit the orchestra had to be led. Their work had to be coordinated. That work is done by a leader in the same way as a foreman of a shop or of an establishment has complete charge, in many instances even to the extent of hiring and discharging. The responsibility for the work turned out by the establishment or the shop is up to the foreman, and yet both the foreman and the individual workers are employees of the establishment.

An hotel customarily employs department heads. Among these are the housekeeper who employs her assistants and discharges them and has charge of the cleaning of the rooms, the executive chef who employs and discharges the stewards, the cooks and scullery maids, and who has charge of the operation of the kitchen, and the superintendent of service

who employs and discharges the bellboys and elevator operators (R. 270). The bellboys, the maids and the other persons who are under one of the above mentioned department heads were considered by the hotels to be employees of the hotel. The salary of each was fixed by the particular department head which employed him (R. 281, 282). No one would deny that these department heads are not employees of the hotel.

That the orchestra is assembled by the leader—on which fact the court below leaned heavily in arriving at its decision—arises out of the necessities of the case and, indeed, results in convenience to the establishment. When the unit concept of the services performed is considered, it becomes entirely immaterial by whom the group is assembled, because, once assembled, the musicians are hired as a group. Because the hotel doesn't take the trouble, and in many instances would not have the ability, to go out and hire individually a group of musicians who could competently and satisfactorily render orchestral music doesn't make the members of the orchestra and the leader any the less the employees of the hotel when hired to perform for the pleasure of the hotel's patrons and for the ultimate profit of the hotel.

What, then, is the relationship between the leader, or "contractor" as he is sometimes referred to in the terminology of the musical field,[1] and the other members of the orchestra? The answer, considered in connection with the exigencies of the occasion as imposed by custom and union rules and regulations, is clear; it is that of agent to principal. The orchestra, while being employed and performing as an entity, must, as any other entity, deal through an agent or contractor. The principal function of the leader is to act as that agent. An "agent," not

[1] The contractor need not necessarily be the leader; any other member of the orchestra can and does act as agent or contractor.

an "employer," is the true description of his relationship, and he has been constituted such by the rules of the union of which he and his fellow musicians are members. It cannot be too strongly stressed that the relationship has been established for the most part by union rules and is closely governed by them. The leader, it must be constantly borne in mind, is merely another musician, one of the members of the orchestra, a member of the union who pays no greater or no less dues than any other member, but who, because of particular musical ability or greater initiative or ability to compose or to direct, or because of looks and personality, is set up or sets himself up as an identifying symbol, the more easily or the more readily for the entire ensemble to secure and maintain employment. While it is true that the leader often assembles the musicians, this fact, as we have seen, arose out of the necessities of the situation—the fact that an orchestra requires prior rehearsals and integration of its playing. Once an orchestra has been assembled, the relationship between the leader and the sidemen is closely regulated by the constitution of the labor organization of which all are members. See in particular Article XIII of the constitution. For the same reason that the leader assembles, the leader has the right to disassemble or to change around so as to be able to continue to produce the desired style or particular musical effect desired or sought for, but the right of the leader to discharge any particular member is closely confined by the provisions of the constitution requiring notice and appeal to the local union. This right of discharge is no greater or no less than the right to discharge by the hotel or establishment, which likewise can discharge any member upon two weeks' notice. Constitution, Article XIII, Sec. 3(c), and see R. 164, 168, 191, 224 and 227.

The court below makes much of the fact that Article X, Section 29, of the constitution of the Federation provides

that members are permitted to accept or negotiate engagements to play in bands or orchestras only with members who contract to furnish such bands, such as the leader. This rule, again, arose out of the necessities of the case and the peculiarities of the trade. Its obvious purpose was to insure that the union regulations would be observed and to permit the union to look to a single member of the orchestra for enforcing its rules, and to permit the employing establishment to know with which responsible member of the orchestra it may deal. Just as the leader acts as agent in securing employment for the entity, it acts as agent in seeing to it that union regulations and wage scales are maintained, the union having found that the most efficient way of preventing chiseling of wage rates is to make one of the members of the union the person to whom the members apply for employment. This provision is in reality a device (and a very effective one) to secure a collective bargaining contract with the employer, through the agency of a member, at rates acceptable to the union.

The employment of the orchestra as an entity and the agency relationship of the leader is seen in the typical contract between an establishment and an orchestra and in the laws, rules and regulations of the American Federation of Musicians, which are expressly made a part of the contract.

The contract forms in the Record, of which petitioner's Exhibit 1, page 45, is a sample, show that the employment contracts were made not with or on behalf of the petitioner alone, but were made for "Griff Williams and his orchestra". These contracts throughout referred, in several places, to the establishment as the employer. The orchestra is referred to as the attraction. The place for the signature on behalf of the orchestra is designated "Attraction sign here". This shows that the establishment treated

not with petitioner alone nor in his own behalf, but treated with the orchestra and that petitioner merely acted as an agent.

Other significant features of a typical contract (Tr. 324, 325) are (1) that the establishment repeatedly was designated by the parties as the employer, a fact not conclusive, but nevertheless entitled to much weight as indicating that the parties themselves considered that the employer-employee relationship existed; (2) that the establishment engaged not the petitioner alone, but "Griff Williams & His Orchestra", comprising fourteen musicians, all of whom, by fair construction, should be considered to be parties to the contract through the agency of the petitioner; (3) that the establishment provided the place for the rendition of services by the petitioner and the orchestra; (4) that the petitioner and the orchestra had to perform at stated hours which were determined by the establishment; (5) that the petitioner and the orchestra were to be paid weekly, a mode of payment characteristic of the master and servant relationship; and (6) that the contract incorporated the laws, rules and regulations of the American Federation of Musicians, which laws, rules and regulations clearly contemplate that the establishment and not the leader is the employer of the sidemen and that the leader is the agent of the orchestra as an entity. (See Pl. Ex. 24, pp. 38 and 39, sec. 11-1; p. 52, sec. 4; p. 53, sec. 7; pp. 54 and 55, sec. 13; p. 54, sec. 12; p. 56, sec. 19; p. 56, sec. 20; p. 56, sec. 22; p. 56, sec. 23; p. 56, sec. 25; p. 58, sec. 29; p. 59, sec. 34; p. 61, sec. 42; p. 62, sec. 1; p. 68 B.; p. 72, sec. 10; p. 73, sec. 15; p. 73, sec. 16; p. 79, sec. 22; p. 79, sec. 24 A; p. 80, sec. 25; p. 80, sec. 29; p. 81, sec. 33; p. 82, sec. 33, 2nd paragraph; p. 86, sec. 47; p. 87, sec. 48; p. 91, preamble F; pp. 104, 105, sec. 4 H; p. 110, sec. 13; p. 110, sec. 14; p. 116, sec. 21; p. 122, S and T; pp. 129 and 130, sec. 3-C; p. 137, sec. 9-G; p. 138, sec. 9-I; p. 142 J; pp. 144 and 145, sec. 12, third paragraph; p. 145, sec. 12, fourth paragraph; p. 145,

second paragraph; p. 146, sec. 13-C; p. 148, sec. 14; p. 150, sec. 19; p. 150, sec. 20; p. 164, sec. 8; p. 166, sec. 6; p. 176, No. 14; p. 176, No. 17; p. 178 p. First; p. 181, No. 31; p. 188, 11th paragraph; p. 189, 19th paragraph; p. 189, 21st paragraph; and p. 190, No. 52.) There is no specific granting or withholding of control over details. Certainly, nothing in the contract lends strength to the defendant's contention that the petitioner is an independent contractor. On the contrary, many of the stipulations usually accepted as indicia of the master and servant relationship appear.

The hotel or establishment specifies the style of music to be played, the hours of performance, the time for intermission, the length of floor shows and the conduct of the members. The orchestra is hired for the purpose of playing at the hotel or establishment's place of business for the entertainment of hotel patrons or guests, and with the expectation or hope on the part of the hotel to make a profit therefrom. The orchestra's members, being highly skilled, obviously cannot be told how to perform. However, if they do not perform to the satisfaction of the hotel or establishment, they can be and are dismissed. The services of the orchestra are continuous and personal in nature. By the playing of music no definite, end result is sought to be obtained nor definite task completed as in the usual case of the independent contractor who enters in upon the premises to complete or repair a construction. All of the services performed are being performed for the sole benefit of the hotel in the ordinary course of its business, and as part of the usual conduct of the affairs of the hotel or establishment. The orchestra, no less than the chef or head waiter or desk clerk, is subservient at all times to the single end of pleasing the patrons or guests of the establishment so that further and increased patronage can be obtained to the greater profit of the hotel. A common sense consideration of the nature of the services performed by an orchestra and the relation of the leader to the other members of the orchestra

would point to the purchaser as the one responsible for Social Security employer taxes upon the wages of the members of the orchestra, including their leader.

The court below reached the conclusion that the leader was an independent contractor and employer only through a refusal to consider the peculiar nature of the relationship and the exigencies which have given rise to factors relied upon by the court in reaching its conclusion and by narrowly, instead of liberally, applying common law concepts to the relationship as disclosed in the evidence. The anomalous effects of the court's holding constitute strong indication of its error. Not only are orchestra leaders deprived of the unemployment and old-age benefits, but they are saddled with onerous additional obligations which, under their customary and established wage scales, they would be entirely unable to assume. Commercial orchestras, especially the smaller and less well known commercial orchestras of which there are thousands, are employed sporadically, and, in times of depression, are the first to be faced with unemployment. Under the decision of the court below, the leaders may not obtain unemployment benefits. Obviously, orchestra leaders, who have devoted their lives for the pleasure and profit of others, are not wanted in old age; the decision of the court below would deprive them of assistance at the time of their lives when most needed.

Another important consideration is this: Congress intended that the unemployment benefits of the Social Security Act should reach as many persons as possible. Under the law, employers must employ eight or more employees before unemployment benefits are obtainable. The vast majority of orchestras consists of less than eight musicians. To hold that the leader rather than the hotel or establishment hiring the orchestra is the employer would deprive a vast number of musicians throughout the country of unployment relief. Surely the Act should be contrued to prevent such a result.

Unemployment and old-age insurance were brought about to benefit wage earners when unemployed or aged and to charge most of the cost to the persons for whose profit they performed their services. Any interpretation should consider the predicament of the wage earner as against that of the person for whom he performs his services. Who is the better able to bear the cost of insurance? Who is the better able to pass it on to the consuming public? The answer in the case of an orchestra leader performing services for another's benefit and profit at a wage scale protected by his union must be obvious. For an orchestra leader to absorb the taxes in titles VIII and IX of the Social Security Act, the leader's wage scale would have to be increased from 25 to 50 per cent depending upon the size of the orchestra. Such an increase is impossible. These taxes would have to be taken from the leader's present wage and in most cases would result in his actually receiving less than any other member of the orchestra. No musician would want to be a leader, and as a consequence the employment opportunities of all musicians would be greatly curtailed.

In this connection it should be again recalled that the establishment at which the orchestra performs, and not the band leader, fixes the prices which the public pays for the entertainment. The establishment, then, is in a greatly more favorable position to pass the tax along to the consumer. Ability to pass the tax to those setting prices is an important indicia of an employer's status under the Social Security Act, as is evident from the report of the House Ways and Means Committee (House Report No. 615, 74th Congress, 1st Session) where it is stated, "Excise taxes measured by payroll will normally be added to prices." Certainly, Congress did not intend to impose liability upon one performing services for another's benefit and profit when that person had no ability to pass off the tax by an increase in price to the consuming public.

Further, it is appropriate for this Court to consider who can best bear the burden of the tax, not only in respect to the amount of money involved, but also the responsibility and labor of keeping records required by the Social Security Act. Assuredly, such burden would weigh less heavily upon an hotel or ball room operating as a permanent institution than upon a peripatetic orchestra leader. In this connection it is also appropriate that the Court should take into consideration that the task of collecting taxes from a permanent establishment would be far less than from one of the class to which the petitioner belongs.

The conferring of an employer's status upon a leader will impose upon the leader other liabilities and responsibilities which reduce to an absurdity the contention that he is an employer. It will require the leader to furnish safe working conditions to his so-called employees, a matter unquestionably within the control not of the leader but of the purchaser; it will make the leader liable under workmen's compensation laws for personal injuries to the other members of the orchestra incurred while performing services for a purchaser, an imposition of a liability upon one who has no opportunity to prevent the injury; it will deprive the leader and the other members of the orchestra of their priority for wages under the bankruptcy law, a right they now enjoy.

Another absurdity consequent upon the conclusion of the court below that the leader is the employer would arise in connection with the National Labor Relations Act. Supposing an hotel or other establishment refuses to employ an orchestra if it is a union orchestra, or any member of an orchestra if the member is a member of a union—under the ruling below, the leader is the employer, and, since he has committed no wrong, apparently the members who have been discriminated against would be left without recourse under the law. There is, of course, no question but what

the Labor Board or any court would hold that the hotel was the employer in a case such as described above. The realities of the situation afford equal reason for declaring that the hotel would be the employer under the Social Security Act, under the circumstances of the present case, as would the hotel be the employer under the National Labor Relations Act in the hypothetical case above.

III—Applicable Decisions.

The Circuit Court Erred in its Construction of the Facts and Application of the Law to the Facts; the Leader is Not an Employer Even Under a Narrow Application of Common Law Concepts.

The language used by the Commissioner of Internal Revenue in Treasury Regulation 90, Art. 205, *supra*, p. 13, to the effect that the employer-employee relationship exists when the person for whom the service is performed has the right to control and direct not only the results to be accomplished, but also the means by which such results are accomplished, undoubtedly expresses the common law on this subject. As stated by the Commissioner, it is not necessary that the employer actually direct or control; it is sufficient if he has the right to do so. The right to discharge, the furnishing of tools and a place to work, are also important but not controlling factors.

When one is found rendering services to another on the other's premises for the other's benefit, the common experience of men gives rise to the spontaneous presumption that he is the servant of and subject to the control of the owner of the premises. This presumption has been recognized many times by the courts, expressly and impliedly, in a wide variety of factual situations, and has led to the imposition of liability on the owner of premises for the torts of those working thereon. Such a presumption constitutes a *prima facie* showing and places upon the Govern-

ment the burden of showing that the petitioner is an independent contractor. As was stated in the recent case of *Washington Recorder Publishing Co.* v. *Ernst*, 176 Wash. 91, 91 P. (2d) 718, 124 A. L. R., 667, 685 (1939):

> "One of the several common law tests or elements considered in the determination of the relationship between the parties is the place where the work is to be done. If the work is done upon the premises of the employer, the inference is strong that the workmen are employees and not independent contractors. If a person is employed to work on the premises of another and for that other's benefit, such other person is presumptively, an employee; and the burden is upon the one engaging the services of such person to establish the independence of the employee."

The services of petitioner and the other members of the orchestra were performed for the sole benefit of the employing establishments and in their usual course of business. This in itself supports the relationship of master and servant. The case of *Herbert* v. *Shanley Co.*, 242 U. S. 591, 37 S. Ct. 323, 61 L. Ed. 511, 513, 514 (1917), forecloses the question as to whether services performed by an orchestra in an hotel are for the benefit of the establishment and in its usual course of business. Considering whether an hotel was liable for copyright infringement because an orchestra in its dining room played copyright music without a license, Justice Holmes, speaking for the Court, said:

> "The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an orchestra, employed and paid by the company. The defendant's performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price as a whole is attributed to a particular

item which those present are expected to order is not important. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise gives a luxurious pleasure not to be had from eating a silent meal. If the music did not pay it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit and that is enough."

To substantially the same effect are *In re Caldwell*, 164 F. 515; *Boyle* v. *Mahoney*, 92 Conn. 404, 103 A. 127, 128, 129; *Rossini* v. *Tone*, 7 Conn. Supp. 13; *Cole* v. *Rome Savings Bank*, 96 Misc. Rep. 188, 161 N. Y. S. 15 (1915); *Performing Rights Society, Ltd.* v. *Mitchell & Booker, Ltd.*, 1 K. B. 762 (1924).

When one performs services for the sole benefit of another in the usual course of business of the other, the person for whose benefit the services are performed is the master of the worker. *DeSandro* v. *Missoula Light & Water Co.*, 48 Mont. 226, 136 P. 711 (1913); *Murray's Case*, 130 Me. 181, 154 A. 352, 353, 75 A. L. R. 720 (1930); 39 C. J. P. 52, sec. 28.

Accepting the foregoing principles, the determination of this cause must resolve itself in favor of petitioner if proper consideration and weight is given to the facts as disclosed by the evidence and as found by the trial court. The trial court entered elaborate findings of fact (Rec. 318) and, based thereon, stated conclusions of law (Rec. 363) to the effect that petitioner was not the employer, and that the taxes assessed against him were erroneously and illegally collected from him.

The trial court's findings of fact should not be set aside by a reviewing court if supported by substantial evidence. This principle finds expression in Rule 52(a), Federal Rules of Civil Procedure, as follows:

"Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses."

Petitioner submits that every fact found by the trial court (Rec. 318) is supported by substantial evidence in the form of testimony given by witnesses whose credibility the trial court had an opportunity to judge. In its opinion, the Circuit Court of Appeals recognized that the findings made by the District Court were binding upon it if substantially supported, and in no respect did it hold that any finding was not so supported. True, the court criticized Finding 11 to the effect that petitioner upon receiving the contract price from the establishments "distributed and paid" to the sidemen the compensation due them. The Government urged that the word "distribute" indicated that petitioner was acting as agent of the establishment in making such distribution. The court held that such a construction was unsupported by the evidence. The court followed with an observation that petitioner was liable in accordance with his agreement with the sidemen, irrespective of whether he received the contract price from the establishments. This holding is contrary to the evidence.

The Constitution, By-Laws and Standing Resolutions of the American Federation of Musicians were expressly made a part of every contract covering an engagement of the orchestra. Such constitution, rules and regulations were received in evidence as Exhibits 23 and 24. True, Section 23 of Article X provides that the member who assumes the responsibility for the payment of another member's services is bound by his action, but that section does not apply to the case at bar. Section 13 of Article IX provides that each local shall designate a time limit when payment must be made by leaders to members, but if leaders are unable to collect from the employing establishments, they are required to notify the local of such inability to collect, in which event the union will take all required action. It is

only when the leader fails to give such notice to the union within the required time that the leader can be held responsible for such claims. This is a salutary provision and further emphasizes the union's conception of a leader as being its representative or steward for the group of men associated with such contractor. Even more significant is the fact that, under Article XIII, Sec. 9G, and Sec. 10C, of the Constitution, made a part of the contract by reference, the local union having jurisdiction can collect the lump sum due for the engagement and distribute to the leader and other members of the orchestra.

However, whether petitioner acted as agent for the establishment or as agent for the orchestra can make no difference, because if he acted as agent for either then he could not be an independent contractor.

The leader's relationship as an agent for the orchestra is clearly evidenced in the method by which members of the orchestra are paid for their services. As found by the trial court, the leader receives the compensation in a lump sum and then distributes the wages to the musicians; the petitioner was a mere go-between for the establishment and the sidemen. The method of payment was a convenience to the establishment and dictated by union rules (Article X, Section 48) for the obvious purpose of facilitating enforcement by the union of its minimum wage requirements.

In any event, the method and manner of compensation is neither important nor controlling in determining whether or not the relationship of master and servant existed, and the fact that the employing establishments did not personally hand over the wages to the individual workers does not relieve them of their responsibility as the employer. *Ballard & B. Co.* v. *Lee*, 131 Ky. 412, 115 S. W. 732 (1909); *Mayhew* v. *Sullivan Min. Co.*, 76 Me. 100 (1884); *Fuller* v. *Citizens Natl. Bank*, 15 F. 875 (1882); *Atlantic Transport Co.* v. *Coneys*, 28 C. C. A. 388, 82 F. 177 (1897); *Raftis* v.

McCloud River Lumber Co., 35 Cal. App. 397, 170 P. 176 (1916); *Decatur R. & Light Co.* v. *Ind. Bd.*, 286 Ill. App. 579 (1913); *Barg* v. *Bousfield*, 65 Minn. 355, 68 N. W. 5 (1896); *DeSandro* v. *Missoula Light & Water Co.*, 48 Mont. 226, 136 P. 711 (1913); *Rankel* v. *Buckstaff-Edwards Co.*, 138 Wis. 448, 720 N. W. 260 (1909).

The Circuit Court of Appeals analyzed Finding 19, listing the specific particulars in which the establishment exercised control, and reached the conclusion that such finding has little probative effect because it is predicated on the statement that the establishments for which the orchestra rendered services during the year 1938 "at times" did the things listed in the 21 sub-paragraphs of Finding 19. The court adds that, for aught that is found, such acts might have represented isolated incidents; but the evidence in the record abundantly shows that each act of control mentioned in Finding 19 was exercised from one to twenty times. However, the Government acknowledges—in fact, stresses—the universal rule that it is not necessary to the relationship of employer and employee that the employer actually direct or control, but that it is sufficient if he has the right to do so. *Singer Mfg. Co.* v. *Rohn*, 132 U. S. 518; *Sawin* v. *Nease*, 186 Okla. 195, 97 P. (2d) 27. The Government will not contend that the record fails to prove the exercise of each control listed in sub-paragraphs (a) to (u), both inclusive, of Finding 19. Petitioner does not contend that every employing establishment undertook to exercise every element of control therein listed; but the fact that such control was exercised by one establishment and the right to such exercise was conceded proves that every other employing establishment could have exercised every element of control therein listed had it chosen so to do. The proof, therefore, brings this case within the rule stressed by the Government, since it abundantly appears that the establishments had the right to exercise the vari-

ous elements of control, whether or not they chose to exercise such right. The Circuit Court of Appeals in its opinion holds that the elements of control listed in Finding 19 can be more aptly described as requests that certain things be done by petitioner and the other members of the orchestra and that compliance with such requests does not indicate or prove the right of control. The amenities of polite life in any group of intelligent persons demand that orders to a subordinate or employee be expressed in courteous terms and tones. A request to a servant, "Kindly hand me my hat," is no less a direction because given in the form of a request.

The Circuit Court of Appeals apparently ignored Exhibit 25, appearing at page 312 of the Record, being the memo issued by the Edgewater Beach Hotel to the orchestra leaders employed by it, and represented by the Manager as typical of instructions given to petitioner. The memo contains suggestions, requests and definite directions, couched in such phrases as, (1) "Be sure that suits are pressed, shirts are spotless, shoes shined and Hair Trimmed"; (2) "Do not loaf in the lobby"; (3) "Don't smoke in the lobby"; (4) "Don't come into the hotel without coat and tie"; (5) "Don't hob-nob with any one guest"; (6) "Don't play to the Radio Audience and Ignore your Dining Room Audience. Play for both"; (7) "Make up your dance groups so that * * * Don't Play All Current Hits. Play some Old Numbers"; (8) "Mix your dance tempos. Don't play two numbers in succession in the same tempo. Don't allow," etc.; (9) "Play One Medley of Old Numbers During Each Broadcast and at least three or four Old Song Medleys Each Night"; (10) "Don't hide your face * * *"; (11) "Don't Chew the 'Mike'"; (12) "Don't say 'Swell'"; (13) "Don't Talk Too Much"; (14) "Don't pull gags." Such phrases can hardly be de-

scribed as mere requests that those things be done or omitted.

The Circuit Court below apparently overlooked the rule stated by Mr. Justice Swayne in *Insurance Company* v. *Dutcher*, 95 U. S. 269, 273, as follows:

> "There is no surer way to find out what parties meant than to see what they have done."

Even in the interpretation of contracts, the practical construction placed thereon by the parties themselves should have great weight. *Shoyer* v. *Wright-Ginsberg Co.*, 240 N. Y. 223; *City of New York* v. *New York City Railway Co.*, 193 N. Y. 543, 549; *Woolsey* v. *Funke*, 121 N. Y. 87, 92.

In considering the question of control, it should be remembered that control is a relative matter and cannot be exercised in the same manner or to the same degree in every situation. In brief, the only control required by the law is that control which is reasonably possible in the light of the nature of the employment. *Claus* v. *De Vere*, 120 Neb. 812, 235 N. W. 450 (1931); *Simmons* v. *Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119 (1933); *McDermott's case*, 283 Mass. 74, 186 N. E. 231 (1933). To expect one who is in all probability not versed in music to control musicians as he might house servants is out of accord with common sense.

In connection with the question of control, it should be pointed out that, while in the instant case the Circuit Court below relied almost exclusively on this factor, that same Circuit in a case decided as recently as June 10, 1942—*John A. Carroll* v. *Social Security Board*—found that the complete absence of a showing of any control was not fatal to a claim that a person over whom no control was exercised was, nevertheless, an employee under the Social Security Act. The court stated in this connection as follows:

> "By the process of elimination, we necessarily find ourselves favorably impressed with plaintiff's con-

> tention that he was an employee of the bank, notwithstanding the apparent lack of the element so often stressed in matters of this character—that is, that the bank had no control over plaintiff's activities. We think the absence of this element is more fanciful than real, but, in any event, is not fatal to plaintiff's theory."

The Circuit Court of Appeals concluded, though we contend, erroneously, that the establishments had no right to hire or discharge members of the orchestra and that this circumstance alone comes near being decisive of the case. The Circuit Court of Appeals added that without the right of discharge there could be no effective control by an employer, thus ignoring modern trends and predicating its conclusions upon a strict application of common law principles, when such concepts are wholly foreign to the social objectives of the legislation in question. The question of hire and fire has previously been discussed, *supra*, p. 22. It must be remembered that the contracts under which services were performed covered fixed periods of time, sometimes for a period of time extending over a number of weeks. The Constitution, made part of the contract, provides that two weeks' notice of termination of services was required to be given to the men, and the court, we submit, was in error in concluding that the right to hire and discharge the members of the orchestra was the sole prerogative of petitioner. Even if it were so, the yardstick employed by the Government to determine the existence of the relationship of employer and employee recognizes that the right to discharge, while an important factor, is not controlling. The right to discharge an employee is not unlimited. In this age of labor unionization and governmental control of employment under the National Labor Relations Act and other statutes, it no longer can forcefully be argued that the right of the employer to discharge his employee is a necessary corollary of the relationship. The situations are numerous, and matters of common knowledge, where union influence

or governmental control has greatly circumscribed the right of discharge. As was said in *Messmer* v. *Bell & Coggeshall Co.*, 133 Ky. 19, 117 S. W. 346:

> "The later cases do not make either the mode of payment, or the right of discharge, or the power to employ assistants or pay them, the decisive test whether a person is an independent contractor or a servant, but look to the broader question whether he was in fact independent or subject to the control of the person for whom the work was done, as to what should be done and how it should be done."

Aside from legislative limitation on the right to discharge, bargaining agreements frequently limit such right by their express terms, as was done in the present case by incorporation of the Constitution.

The remaining ground relied upon by the Circuit Court of Appeals for its conclusion was that petitioner was engaged in an independent business for profit. The fact that an orchestra is composed of musicians who band together in more or less of a permanent group and offer their services to various hotels and establishments seems to impel the court below to the conclusion that the leader was, therefore, an entrepreneur of some sort or other. Considering the orchestra as an entity, these factors are as immaterial to an employer-employee relationship as would be the fact that a single provider of entertainment, such as a singer or an accordion player, would sell his services to hotels or other establishments, or that a chef or other person possessing talents of benefit to the hotel would sell his services to hotels. A leader, although receiving a higher wage than the other members of the orchestra, does so in compensation for extra services and not as a reward for risks run. His basic salary is established and guaranteed by union rules, as are those of every other member in the orchestra. Article XIII, Sec. 3, of constitu-

tion. The leader's wage does not depend upon the amount of profit that the hotel or establishment employing the orchestra makes. In those few cases where the compensation of the leader did include a percentage of the receipts, the practice was to divide among the sidemen and the leadmen the amount received in excess of the guaranty (R. 174). The leader does not bear any of the expenses of the orchestra. In most instances, his rate is usually one and one-half times, dependent upon the prevailing rate as determined by the local in whose jurisdiction he is playing, the rate of the sidemen. If not expressly provided for at such rate in the contract, such rate is approximated by the payment of a lump sum which, after the deduction of expenses and salaries, leaves the leader the additional rate. This higher rate serves to compensate the leader for his extra responsibilities and duties, and for his contribution to the employability of the entity. He, like the other musicians, obtains his minimum regardless of what the hotel or other establishment may make or lose. The fact that the leader's compensation is in all cases based on a fixed sum, and is not dependent upon the drawing power of his performance at the particular establishment, clearly indicates that the leader is not conducting a financial enterprise for profit and in which he risks loss. The court found—and the defendant does not attack the finding—that "The compensation paid by the establishments varied with and was sometimes more, but never less, than the minimum Federation scale of wages for leaders and 'sidemen' as fixed for the local Union jurisdiction in which the establishment was located." (R. 330) Petitioner, therefore, could not suffer a loss since the price in each contract was computed with reference to fixed expenses and minimum wages both for petitioner and the sidemen. The additional remuneration a leader or contractor may receive, based upon the additional services performed, is hardly an amount commensurate with

any risks of doing business. It is true that both petitioner and some of the sidemen received compensation in excess of the union scale, but their compensation was measured by a period of time which courts have found to be indicative of wages of an employee. *Thompson* v. *Twiss, et al.*, 90 Conn. 444, 87 A, 328, 331 (1916); *Keys* v. *Second Baptist Church*, 99 Me. 308, 59 A, 446, 447, (1904); *Bristol & Gale Co.* v. *Industrial Commission, et al.*, 292 Ill. 16, 126 N. E. 599, 600 (1920); *Porter* v. *Withers' Estate Co.*, 201 Mo. App. 27, 210 S. W. 109, 110 (1919); *Madix* v. *Hochgreve Brewing Co.*, 154 Wis. 448, 143 N. W. 189.

The cases are many in which individuals, who have far more characteristics of independent contractors than does the petitioner in this case, have been held to be employees, although their compensation was measured by the difference between wages paid to persons employed by them and the sum they received from their employer. *Indiana Iron Co.* v. *Cray*, 19 Ind. App. 565, 58 N. E. 803 (1897); *Gulf Refining Co.* v. *Brown*, 93 F. (2d) 870 (C. C. A. 4, 1938), and cases cited therein; *Messmer* v. *Bell & Coggeshall Co.*, 133 Ky. 19, 117 S. W. 346 (1909); *Sempier* v. *Goemann*, 165 Wis. 103, 161 N. W. 354 (1917); *Barg* v. *Bousfield, et al.*, 65 Minn. 355, 68 N. W. 45 (1896); *Finley* v. *Keisling, et al.* 151 Tenn. 464, 270 S. W. 629 (1925); *Nyback* v. *Champagne Lumber Co.*, 109 F. 732 (C. C. A. 7, 1901); *In re Palmer*, 256 App. Div. 834, 15 N. Y. S. (2d) 628 (1938); affd. 283 N. Y. 575, 27 N. E. (2d) 438; *Swain* v. *Kirkpatrick Lumber Co.*, 143 La. 30, 79 So. 140; *Murray's Case*, 130 Me. 181, 154 A. 352, 75 A. L. R. 720.

Lest any undue significance be given to Finding No. 12 (R. 330) of the trial court that the petitioner "paid the traveling expenses of the orchestra, commissions and other miscellaneous expenses", as apparently was done by the court below, it should be noted that a reading of the entire

finding indicates the trial court deemed the payments were made on behalf of the establishments and not on petitioner's own behalf. Expenses were never paid or assumed by the leader; Article XIII, Section 12, of the Constitution, incorporated into the contract, provides that hotels or establishments pay all expenses. Therefore, the establishments contracted to pay for the orchestra's transportation and included appropriate sums for traveling expenses in a lump sum specified in the contract.

The record further discloses that in those few instances where compensation was on the basis of a guarantee and a percentage of the receipts, petitioner divided among the sidemen and himself the amount received in excess of the guarantee. Had petitioner been an entrepreneur, the excess would have belonged entirely to him; and had petitioner been an entrepreneur instead of a working member of a musicians' union, but performing additional functions of leader and agent, he hardly would have permitted collection of the entire sum due by the union, or, for that matter, would hardly have been a member of an organization which prescribed minimum rates of pay for him.

It is stated at page 489, section 220, Restatement of Agency, that the inference arising from the fact that workmen are employed on the premises of another is not necessarily rebutted by the fact that they are paid by the amount of work performed and supply their own tools and their own assistants. The authors illustrate this statement as follows (p. 490):

> "P. is the owner of a coal mine, employing miners. He provides them with the larger units of machinery and the means of ingress and egress. The miners supply their own implements, the powder necessary and their own helpers, being paid for each ton mined and brought to the surface. The miners, including the assistants, are the servants of the mine owner."

The petitioner was no more of an entrepreneur than the miners mentioned in the Restatement of Agency illustration. As has been shown, the only expense borne by petitioner was for musical arrangements, but even had he paid all expenses out of his own pocket that fact would not be controlling. *Singer Mfg. Co.* v. *Rahn,* 132 U. S. 516, 10 S. Ct. 165, 33 L. Ed. 440. It is obvious, and requires the citation of no authority, that one in an independently established business controls his own hours of work, does not devote himself to the employer's work at fixed times, but works when he pleases, being responsible to the employer only for a certain specified result. Such was not the petitioner's situation. He was required to and did perform musical services for the establishments during specified periods of time. There was, and could be, no specified result which would satisfy the requirements of his contract. He performed personal services.

The true test of whether one is engaged in an independently established business is not whether he serves many persons or few, but whether he is acting on his own behalf or the behalf of another. *Washington Recorder Publishing Co.* v. *Ernst,* 176 Wash. 91, 91 P. (2d) 718, 124 A. L. R. 667, 678, 679 (1939), where the court quoted with approval the following language from *Fidelity & Casualty Co.* v. *Industrial Accident Commission,* 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304, 1308 (1923) (p. 581):

> "Respondents emphasize the phrase, 'in the course of an independent occupation' and argue that the decedent was not pursuing an independent occupation because he was not doing hauling for anyone else, and was not permitted so to do under the provisions of his contract for the term thereof. This is a *non sequitur.* The question whether or not one is pursuing an independent occupation does not depend upon whether he is serving one person or many persons, but whether in the pursuit of his occupation he is acting

upon his own behalf or as the servant of another. * * * 'If he never serves more than one person there is usually a presumption that he has no independent occupation; but this presumption is not conclusive. A single large railroad company, for example, might find work enough for a contractor to occupy his whole lifetime, yet leave him to work in perfect independence, accepting the result of his labor without ever interfering with his choice of the mode and instruments of working. On the other hand, one may have many employers within a short space of time, yet be a mere servant to each of them in turn. * * * The one indispensable element of his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.' "

Petitioner's contract with the establishments called for personal, non-delegable services and not the achievement of a specified result. The courts uniformly have held that the indispensable characteristic of an independent contractor is responsibility to the contractee only as to the result of the work and not as to the means by which the result is accomplished. *Casement* v. *Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582. Musical services are in their essence personal in nature and accomplish no end result; that is, every instant the services are being performed is as much an accomplishment of their purpose as is the entire rendition of the services. In the case of an orchestra hired to play for three hours, there is no specified result which is achieved at the end of the three hours of playing—the rendition of the musical services throughout the entire three-hour period itself being the aim of their employment. The type of work contemplated under the doctrine of independent contracting is the completion or repair of a product and not that of continuing personal services. *Hexemer* v. *Webb*, 101 N. Y. 377, 4 N. E. 755 (1886). The doctrine of independent contractor, therefore, is inapplicable to the

performance of musical services. Musical services are *continuing* personal services. There can be no finished product.

An independent contractor, in accomplishing the specified result, can perform the necessary work in any manner he chooses, else the contract is dependent and not independent. If he can do the work in any manner he chooses, he can delegate the work to others, and thus accomplish the specified result. He has the right to select the workers as well as the tools by which the result shall be accomplished and need not personally perform the necessary work. Conversely, a contract which requires the contractor to render his own personal services, and under which he may not delegate the work to another, is a dependent contract and the contractor is an employee of the contractee. This was the principal test applied by the court in *Barrett* v. *Selden-Breck Construction Co.*, 103 Neb. 850, 174 N. W. 866, 868 (1919).

The Circuit Court of Appeals comments on the fact that the orchestra was not organized and trained at the behest of the employing establishments and was a going concern ready and willing to serve any and all who might contract for its services. We have already seen how, by the nature of things, orchestras are assembled and directed by a member of the orchestra who functions as an integral part of the orchestral unit. However, the fact that the orchestra was thus assembled and offered its services is of little significance; where unit functioning is necessary to supply the desired service, all the members constituting the unit are the employees. *Aetna Life Ins. Co.* v. *Culvahouse*, (Tex. Civil App.) 10 S. W. (2d) 603 (1928); *Spencer* v. *Marshall*, 107 Kan. 264, 191 P. 468, 469 (1920); and *Dixon Casing Crew* v. *State Industrial Commission*, 108 Okla. 211, 235 P. 605 (1925). All three cases cited concerned the employment status of members of so-called "casing crews," which

held themselves out as available to render skilled service in connection with drilling of oil wells. The members of the crews, *including the leader*, were held to be employees, even though in the *Culvahouse* case the crew was known as "Johnnie's Casing Crew," in the *Spencer* case as the "Santa Fe Casing Crew," and in the *Dixon* case as the "Dixon Casing Crew."

Thus, it will be seen that the facts disclose not only an actual exercise of control and direction over petitioner and the other musicians as to the results to be accomplished, but also as to the details and means by which that result was accomplished. The members of the orchestra were subject to the will and control of the establishments, not only as to what was to be done but how it was to be done. Not every establishment exercised the same direction or control over the manner in which the services of the orchestra were performed, but it is manifest that each establishment had the right to do what any other establishment did, and the employer-employee relationship is abundantly proved, even under the strict principles of the common law.

IV.

The Terms "Employer" and "Employee" as Used in the Social Security Act Should be Given a Liberal Construction to Promote the Objects and Purposes of the Act, Rather Than the Restrictive Meaning Which Grew Up in the Field of Tort.

Congress left the terms "employer" and "employee" undefined in the Social Security Act. It was stated by this Court in *United States* v. *American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345 that:

> "The word [employee] is not a word of art. It takes color from its surroundings."

This statement is further elucidated in footnote 29 in that case by the following language:

> "That the word 'employees' is not treated by Congress as a word of art having a definite meaning is apparent from an examination of recent legislation. Thus the Social Security Act specifically provides that 'The term "employee" includes an officer of a corporation.'"
>
> • • • • • • •
>
> "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content."

The terms, accordingly, should be construed so as to carry out the purposes of the Act and not so narrowly as to exclude persons whom the legislature obviously intended to participate in the benefits of the Act. As stated in *United States* v. *American Trucking Associations, supra,*

> "Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts."

The court below has undertaken to apply a meaning to the terms which has arisen solely in the field of tort. It is submitted that this approach to the problem of interpretation is erroneous, and if the precedent that has thereby been established is left to stand, a great number of persons who might otherwise be expected to participate in the benefits of the Act would be excluded.

The broad social objectives of the Social Security Act are shown by its executive and legislative history and are elucidated in *Helvering* v. *Davis,* 301 U. S. 169, 57 S. Ct. 904, 81 L. Ed. 1307 (1937) and *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937).

The objectives of the Act indicate that the term "employer" as used in the Act was intended to cover that class

of persons regarded as being in business for themselves, as regularly employing others for their own profit or benefit and presumably more or less financially independent and relatively masters of their own destiny. Contrasted with such are individuals who have no business of their own, but spend their lives promoting in some way the business of others and whose economic welfare is, therefore, largely within the control of those for whom they render service. The petitioner is one of these. This conception accords with actuality and is the basis for a liberal interpretation of the terms "employer" and "employee," even at the expense of the strict rules of tort liability. This, the court below has recognized in a later decision—*Carroll* v. *Social Security Board*, decided June 10, 1942, in which it stated:

> "The purpose which Congress had in mind and the object sought to be accomplished by the enactment before us, is aptly stated in *Helvering* v. *Davis*, 301 U. S. 619, 640, *et seq.* That it should be liberally construed in favor of those seeking its benefits cannot be doubted."

In the present case, the court below narrowly applied master-servant and independent contractor concepts in finding petitioner an employer, contrary to a subsequent admonition in the *Carroll* case and in disregard of other decisions stressing the necessity for a liberal application of common law rules. Thus, it was stated in the case of *In re Wilson*, 35 F. Supp. 391, 392, (D. C. N. D. N. Y., 1940); "the remedial nature of the legislation in question (N. Y. State Unemployment Insurance Act) makes it necessary that a more liberal determination of the scope of the term 'employee' be given than that which might be the rule in the field of tort," and the measure of control which must exist to establish the employment relationship may be "a lesser degree than that determinative in the tort field."

There is an analogy between Social Security legislation and Workmen's Compensation cases, for in both employee protection and relief is the objective. While certain tort rules have been clung to by the courts in deciding cases under workmen's compensation laws, these rules are given a liberal interpretation to protect as many workers as possible. *South Chicago Coal & Coke Co.* v. *Bassett*, 104 F. (2d) 522, 526, (C. C. A. 7, 1939); *Cole* v. *Minnick, et al.*, 123 Neb. 871, 244 N. W. 785, (1932); *Field & Co.* v. *Industrial Commission of Illinois*, 285 Ill. 333, 120 N. E. 773, 774 (1918); *Hartford Accident & Indemnity Co.* v. *Cardillo*, 112 F. (3d) 11, 13, 72 App. D. C. 52 (1940); *Arizona-Hercules Copper Co.* v. *Crenshaw*, 21 Ariz. 15, 184 P. 996, 999 (1919). As emphatically stated by the court in *McDowell* v. *Duer*, 78 Ind. App. 440, 133 N. E. 839 (1922) (p. 840):

> "The doctrine of 'independent contractor' is peculiar to the law of negligence, and we are not aware that it is appropriate to any other branch of the law. Certainly, it has no proper place in the law of workmen's compensation. We will eliminate that term, therefore, from further consideration."

Social Security legislation is *sui generis* and is far removed from the field of tort wherein rules designed to place tort liability can properly be applied. When applied at all to social legislation, they should be applied most liberally and humanely.

To borrow the tests usually stated for the imposition of liability arising out of the master and servant relationship at common law and to apply such tests to social security law would be to disregard the reasons for their adoption. The application of such tests would be unsatisfactory because the common law of master and servant, agency and tort, operates not only through mechanical tests, but also through the rationale applicable to the imposition of the

particular liabilities. The rationale to be applied to social security cannot be borrowed from tort.

In enacting the Social Security Act as an attempt to alleviate the evils attendant upon old age and unemployment, Congress was unquestionably concerned with the menace to the general welfare resulting from old age indigency and unemployment of "employees" in a general sense, and not only among those persons whose activities were subject to the particular quantum of control and supervision by the person for whom they performed their services necessary to impose tort liability on their employer. The risk of poverty during old age and of unemployment, as distinguished from the risk of injury, may not be minimized or augmented by the individual employer's authority to control or supervise the details of the workers' activities; these risks exist with respect to all employment regardless of whether the relationship between the worker and his employer is or is not described as master and servant. The fact that an employee may be left to his own devices and discretion in performing some of his duties does not lessen the risk of unemployment and old age indigency, or render him better able to cushion himself against them.

It may fairly be inferred that these considerations led the Committee on Ways and Means of the House of Representatives, in reporting its proposed 1939 amendments to the Federal Social Security Act, to say:

> "A restrictive view of the employer-employee relationship should not be taken in the administration of the Federal old age and survivors insurance system, in making coverage determinations. *The tests for determining the relationship laid down in cases relating to tort liability and to the common law concept of master and servant should not be narrowly applied.* (Emphasis supplied.) (House Report No. 728, 76th Congress, First Session, page 76.)

Surely, it cannot be doubted that, under a liberal application of common law principles as set forth in the previous section, petitioner is not an employer, and even less can it be doubted that petitioner and others in his class were intended to be excluded from the benefits of the Act. It is respectfully submitted that the court below erred in narrowly applying the common law in disregard of the purposes of the Act so as to hold that leaders rather than establishments are employers of orchestras.

Conclusion.

The questions raised above are important in their own right, and their determination will affect the rights of millions of citizens under the Social Security Act. A writ of certiorari should be granted as prayed in the accompanying Petition.

Respectfully submitted,

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